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NO. 480

IN THE

# Supreme Court of the United States

October Term, A. D. 1950

VICTOR L. STEDMAN, Jr.,
Appellant in Error,

vs.

THE UNITED STATES OF AMERICA,
Appellee in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

## MOTION TO DISMISS OR AFFIRM PROHIBITION.

VICTOR L. STEDMAN,
Appellant in Error in Pro Per.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1920.

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VICTOR L. BERGER et al.
*Plaintiffs in Error,*

*vs.*

THE UNITED STATES OF AMERICA,
*Defendant in Error.*

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## MOTION TO DISMISS OR ABATE PROSECUTION.

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Comes now the attorney for the plaintiffs in error and moves the Court to dismiss this case and order the discharge of the defendants or abate the further prosecution thereof and for reason thereof, says that the plaintiffs in error, Victor L. Berger, Adolph Germer, William F. Kruse, Irwin St. John Tucker and J. Louis Engdahl, were indicted by the grand jury of the District Court of the United States, Northern District of Illinois, Eastern Division, on the 2d day of February, 1918, charged with conspiracy to violate Section 3 of Title I of an Act of Congress, approved June 15, 1917, and entitled "An Act to Punish Acts of Interference with Foreign Relations, The Neutrality and the Foreign

Commerce of the United States, and to Punish Espionage and Better to Enforce the Criminal Laws of the United States".

Said plaintiffs in error were convicted in a trial before the Honorable Kenesaw M. Landis and, respectively, sentenced to twenty years in the penitentiary from which a writ of error was sued out from the United States Circuit Court of Appeals for the Seventh Circuit; and that a petition presented requesting removal or change of venue from said Honorable Kenesaw Mountain Landis, judge of said District Court was overruled by said trial judge, error being assigned thereon and pending before the United States Circuit Court of Appeals based upon the refusal of said trial judge to grant said removal; that said cause is now pending before said Circuit Court of Appeals and said Court has certified to this Court the question of the sufficiency of the affidavit and petition for said removal or change of venue and submits the following questions to this Court:

1. Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the Act which provides for the filing of affidavit of prejudice of a judge?
2. Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?
3. Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge Landis have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment? * * *

We contend in support of our motion that the further prosecution of this case by the government should terminate by an order directing the dismissal of this cause or that the prosecution abate during the period while we are not "at war" with the Imperial German Government

because we are not now at war with the Imperial German Government as the Act upon which this prosecution rests is now repealed or has abated as a result of peace or the discontinuance of war.

We respectfully submit and file briefs in support of this motion.

Respectfully submitted,

SEYMOUR STEDMAN,
*Attorney for Plaintiffs in Error.*

NO. 460

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

VICTOR L. BERGER, et al.,
*Plaintiffs in Error,*

vs.

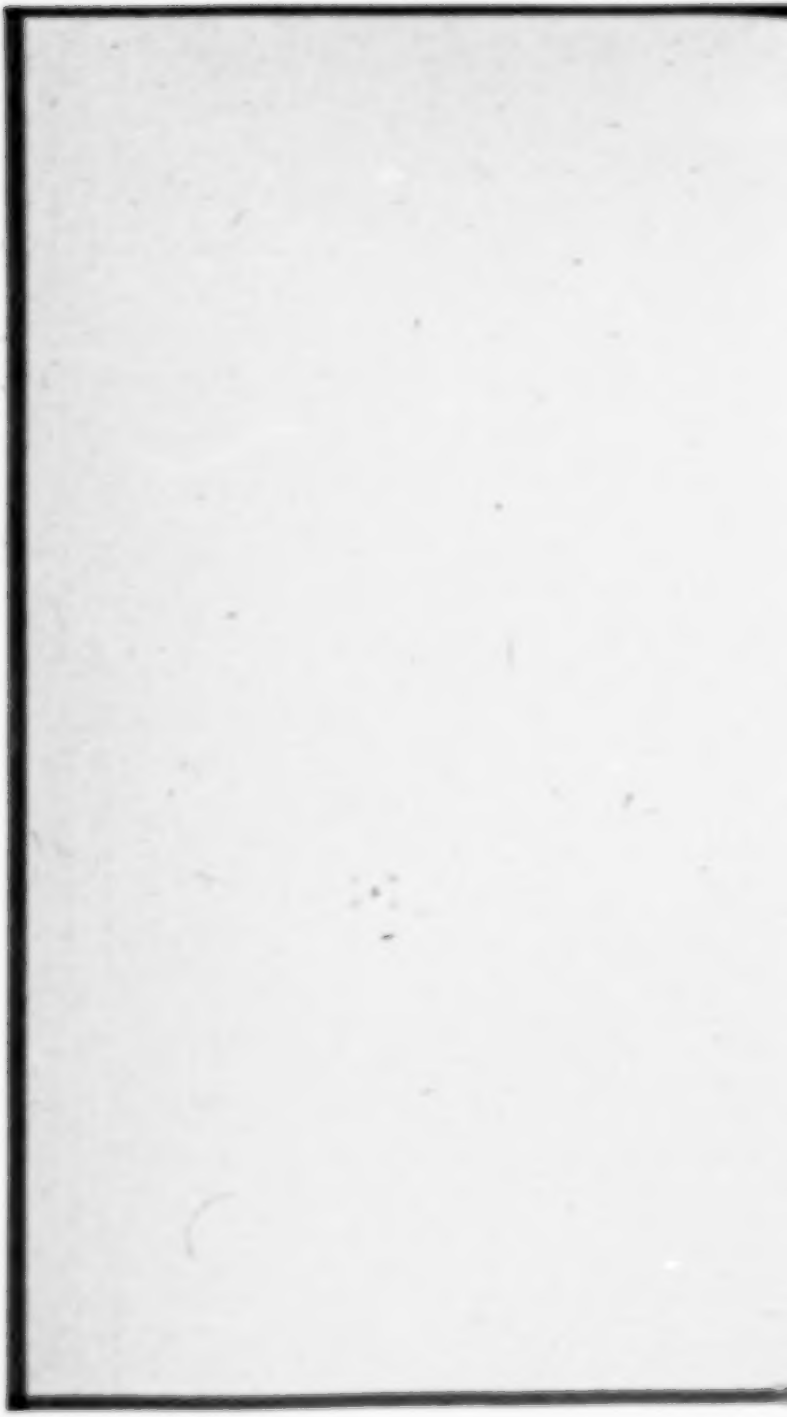
THE UNITED STATES OF AMERICA.
*Defendant in Error.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR ABATE PROSECUTION.

SEYMOUR STEDMAN,
ATTORNEY FOR PLAINTIFFS IN ERROR.

BYRON S. ADAMS CO., LAW PRINTERS, CHICAGO.



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NOTE: The brief and argument supporting the contention that the joint resolution of Congress passed May 27, 1920, declaring peace, establishes peace, is taken substantially from the brief filed by Harry S. McCartney, *pro se.*, in case No. 599, pending in this court, entitled United States of America *ex rel.* Harry S. McCartney v. Bainbridge Colby, Secretary of State, and Henry L. Bryan, Editor of Laws.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1920.

VICTOR L. BERGER et al.
*Plaintiffs in Error,*
*vs.*
THE UNITED STATES OF AMERICA,
*Defendant in Error.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR ABATE PROSECUTION.

Supporting said motion we submit the following:

1. Meaning of, "is at war."
2. The United States "is" not now "at war."
3. The expiration or repeal of a law without a saving act stops prosecutions thereunder.
4. This applies to cases pending upon appeal.

The section of the Act under which this prosecution is brought, that is, Section 3 or what is commonly known as the Espionage Act, provides that

> "*whoever, when* the United States *is AT war* shall willfully make or convey false reports, * * * obstruct the recruiting or enlistment service * * * cause or attempt to cause insubordination shall be punished, etc."

The meaning of "is at war" it is important to determine as distinguished from war, or a technical war.

5. Congress by resolution has the power to make and declare peace—this is argued.

## War.

War in a legal sense has been defined to be "the state of nations among whom there is an interruption of *all* pacific *relations and* a general contestation of arms authorized by the sovereign. *Bishop* v. *Jones,* 28 Tex. 494-319; Elizabeth Ann. 1st Dods, p. 344; The Nayade Fourth, See Robinson 251, 235.

War in the broad sense, is a properly conducted contest of armed public forces. In a narrower sense war is a state of affairs during the continuance of which the parties to the war may *legally exercise force* against each other; 40th Cyc. p. 343.

There is a distinction between war in a material sense and war in a legal sense. The Three Friends, 166 U. S. p. 1.

The existence of war in the material sense is evident in the use of force by the parties. *Lewis* v. *Ludwig,* 6 Coldw. (Tenn.) 368. *Underhill* v. *Hernandez,* 168 U. S. 250.

The existence of war in the legal sense is determined by the authorized political department of the government. The Pedro, 175 U. S. 354; Prize Cases, 2nd Black (U. S.) p. 635.

## Definitions

### Of the verb "is"

Is, is the present indicative of, be. Be means in a state of existence, in a special state, manner or relation. In relation to the word "at" it means *active.* War is made active by the preposition "at" and with, to be, clearly means a present state of active war.

## Of the Preposition "at"

Standard Dictionary (Students' Edition) at, in contact with; on; upon; *of motion;* in the direction of; in pursuit of; in quest of; engaged in; occupied with.

Webster's New International Dictionary 4. At, situation in an active or passive state, in a posture, circumstance or mode; as, the stag *at* bay; *at* war.

Bouvier: at, expresses position attained, by motion to.

## We Are Not Now at War.

On November 11, 1918, the President of the United States, addressing both Houses of Congress, and referring to the armistice which had been signed said:

> "The war thus comes to an end; for having accepted these terms of armistice it will be impossible for the German nation to renew it. * * * It is not now possible to assess the consequences of this consummation. We know only that this tragical war, whose consuming volume swept from one nation to another until all the world was on fire, is at an end."

On June 28, 1919, the President signed the Treaty of Peace with Germany. On July 10, 1919, he presented the Treaty to the Senate and formally declared to the Senate that,

> "the war ended in November, eight months ago." On November 30, 1919, the War Department officially declared that "in general the accident of war and the progress of demobilization are at an end." On October 27, 1919, the President in vetoing the Volsted Bill, which sought to enforce the war-time Prohibition Act, stated that the objects of the latter "having been satisfied in the demobilization of the army and navy, and whose repeal I have already sought at the House of Congress."

On November 11, 1919, General Pershing in an Armistice Day announcement to the people of the United States said:

> "Our armies have been demobilized and our citizen-soldiers have returned again to civil pursuits with the assurance of their ability to achieve therein the success they attained as soldiers."

RESOLUTION. ADOPTED MAY 21, 1920.

House joint resolution (H. J. Res. 327) terminating the state of war declared to exist April 6, 1917, between the Imperial German Government and the United States, permitted upon conditions the resumption of reciprocal trade with Germany, and for other purposes.

That the joint resolution of Congress passed April 6, 1917, declaring a state of war to exist between the Imperial German Government and people of the United States, and making provisions to prosecute the same, be, and the same is hereby, repealed, and said state of war is hereby declared at an end: PROVIDED, however, That all property of the Imperial German Government, or its successor, or successors, and all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under the control of the Government of the United States or any of its officers, agents or employees, from any source or by any agency whatsoever shall be retained by the United States and no disposition thereof made, except as shall specifically be hereafter provided by Congress, until such time as the German Government has, by treaty with the United States, ratification whereof is to be made by and with the advice and consent of the Senate, made suitable provision for the satisfaction of all claims against the German Government of all persons, wheresoever such persons have suffered, through the acts of the German Government or

its agents since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, through the ownership of shares of stock in German, American or other corporations or have suffered damage directly in consequence of hostilities or of any operations of war, or otherwise until the German Government has given further undertakings and made provision by treaty, to be ratified by and with the advice and the consent of the Senate, for granting to persons owing permanent allegiance to the United States, most favored nation treatment, whether the same be national, or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce, and industrial property rights, and confirming to the United States, all fines, forfeitures, penalties, and seizures imposed or made by the United States during the war, whether in respect to the property of the German Government or German nationals, and waiving any pecuniary claims based on events which occurred at any time before the coming into force of such treaty, any existing treaty between the United States and Germany to the contrary notwithstanding.

SEC. 2. That in the interpretation of any provision relating to the date of the termination of the present war of the present or existing emergency in any acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the date of the termination of the war or of the present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war, or of the present or existing emergency, notwithstanding any provision in any act of Congress or joint resolution providing any other mode of determining the date of the termination of the war or of the present or existing emergency.

SEC. 3. That until by treaty or act or joint resolution

of Congress it shall be determined otherwise, the United States, although it has not ratified the treaty of Versailles, does not waive any of the rights, privileges, indemnities, reparation, or advantages to which it and its nationals have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof or which under the treaty of Versailles have been stipulated for its benefit as one of the principal allied and associated powers and to which it is entitled.

SEC. 4. That the joint resolution of Congress approved December 7, 1917, declaring that a state of war exists between the Imperial and Royal Austro-Hungarian Government and the Government and the people of the United States and making provisions to prosecute the same, be, and the same is hereby repealed, and said state of war is hereby declared at an end, and the President is hereby requested immediately to open negotiation with the successor or successors of said Government for the purpose of establishing fully friendly relations and commercial intercourse between the United States and the Government and peoples of Austro-Hungary.

## Authorities Holding That a Treaty of Peace Is Not Absolutely Necessary to Establish a State of Peace.

PHILLIMORE: There appear to be three ways by which war may be concluded and peace restored:

1. By a *de facto* cessation of hostilities on the part of both belligerents and a renewal *de facto* of the relation of peace.

2. By the unconditional submission of one belligerent to another.

3. By the conclusion of a formal treaty of peace between the belligerents.

A formal declaration on the part of the belligerents that war has ceased, however usual and desirable, can not be said to be *absolutely* necessary for the restoration of peace. War may silently cease and peace be silently renewed. So ended the war between Sweden and Poland in the year 1716; namely, by a reciprocal intermission of hostilities; it was not until after the lapse of 10 years that peace was formally and *de jure* recognized as subsisting between the two kingdoms.

In such a state of things the presumption of law would be that both parties had agreed that the *status quo ante bellum* should be received. Yes, in the absence of any formal declaration, it would not be concluded that the claims which had given occasion to the war, or which had grown out of the war, were abandoned, but they must be considered as in abeyance. In fact, it is as difficult to predicate the consequences, legal and practical of such a state of things as it would be to predicate the consequences of a treaty of peace which contained no clause of amnesty. (Phillimore, Sir Robert, International Law Pt. 12, ch. 1, pars. 510, 511.)

OPPENHEIM: Be that as it may, a war may be terminated in three different ways. Belligerents may, first, abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty. Or, secondly, belligerents may formally establish the condition of peace through a special treaty of peace. Or, thirdly, a belligerent may end the war through subjugation of his adversary.

The regular modes of termination of war are treaties of peace or subjugation, but cases have occurred in which simple cessation of all acts of war on the part of both belligerents has actually and informally brought the war to an end. Thus ended in 1716 the war between Sweden and Poland and in 1720 the war between Spain and

France, in 1801 the war between Russia and Persia, in 1876 the war between France and Mexico. And it may also be mentioned that, whereas the war between Prussia and several German States in 1866 came to an end through subjugation of some states and through treaties of peace with others, Prussia has never concluded a treaty of peace with the Principality of Lichtenstein, which was also a party to the war. Although such a termination of war through simple cessation of hostilities is for many reasons inconvenient and is therefore, as a rule, avoided, it may nevertheless in the future as in the past occasionally occur. (Oppenheim, L. International Laws, Secs. 261, 262.)

Hefftter: It is not necessary that the termination of a state of war shall be formally declared by the belligerent parties, although it is advisable and customary. Hostilities may be silently ended. After friendly relations have thus been re-established neither party may claim privileges which may accrue from a continued state of war. (Heffter, A. W., Das Europaische Vokerrecht der Gegenwart, Sec. 177.)

Seward: It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances.

The proceedings of Spain and Chile which have been referred to, although conclusive, require an explanation on the part of either of those powers which shall insist that the condition of war still exists. Peru, especially with Spain, has an absolute right to decline the good offices or

mediation of the United States for peace as either has to accept the same. The refusal of either would be inconclusive as evidence of determination to resume or continue the war. It is the interest of the United States, and of all nations, that the return of peace, however it may be brought about shall be accepted whenever it has become clearly established. Whenever the United States shall find itself obliged to decide the question whether the war still exists between Spain and Peru, or whether that war has come to an end, it will make that decision only after having carefully examined all the pertinent facts which shall be within its reach, and after having given due consideration to such representations as shall have been made by the several parties interested. (Seward, W., Secretary of State, to Mr. Goni, Spanish minister, July 9, 1868, U. S. Diplomatic Correspondence, 1868, II. 32, 34.)

VATTEL: We shall, therefore, content ourselves with observing that in case of a pressing necessity, such as is produced by the events of an unfortunate war, the alienations (of a part of a state) made by the prince in order to save the remainder of the state are considered as approved and ratified by the mere silence of the nation, when she has not, in the form of her government, retained some easy and ordinary method of giving her express consent, and has lodged an absolute power in the prince's hands. (Vattal, E. de, Law of Nations, Book IV, ch. 2, sec. 11.)

HALL: War is terminated by the conclusion of a treaty of peace by simple cessation of hostilities, or by the conquest of one, or of part of one, of the belligerent states by the other. (Hall, W. E. A. Treatise on International Law, III. ch. 9.)

**Effect of Termination of War Through Simple Cessation of Hostilities.**

OPPENHEIM: Since in the case of termination of war through simple cessation of hostilities no treaty of peace embodies the conditions of peace between the former belligerents, the question arises whether the status which existed between the parties before the outbreak of war, the *status quo ante bellum*, should be revived, or the status which exists between the parties at the time when they simply ceased hostilities, the *status quo post bellum* (the *uti possidetis*), can be upheld. The majority of publicists correctly maintain that the status which exists at the time of cessation of hostilities becomes silently recognised through such cessation, and is, therefore, the basis of the future relations of the parties. This question is of the greatest importance regarding enemy territory militarily occupied by a belligerent at the time hostilities cease. According to the correct opinion, such territory can be annexed by the occupier; the adversary, through the cessation of hostilities, having dropped all rights he possessed over such territory. On the other hand, this termination of war through cessation of hostilities contains no decision regarding such claims of the parties as have not been settled by the actual position of affairs at the termination of hostilities, and it remains for the parties to settle them by special agreement or to let them stand over. (Oppenheim, L. International Law, sec. 263.)

**Effect of Rejection of Ratification of Peace Treaty.**

FIORE: As soon as the decision not to ratify the treaty has been finally reached, the law of war shall once more be in full force and hostile acts may again be undertaken without reservation or condition. (Fiore, Pasquale, International Law Codified, sec. 1962.)

WESTLAKE: The contracting authorities, of whom only one can, in general, be present at the court where the treaty is signed, reserve to themselves the power to conclude finally. The ratification may be refused by any party; and although this would be offensive if done without grave reason, it is impossible to limit the right of doing it, and there are sufficient examples of its being done even by foreign ministers who all along had control over the negotiations. Where the contracting authority is shared by a body having no such control, as the Senate of the United States, refusal of ratification may result from the exercise of independent judgment, and is very natural. Such a body will occasionally attempt to qualify its ratification by a modification of the terms of the treaty, but such a proceeding is nothing more than the proposal of a new treaty, which may or may not be accepted. (Westlake, J. International Law, Pt. I, ch. 12.)

**Instances Where Ratification of Treaties Was Refused.**

TWISS: It may happen after a treaty has been signed by the plenipotentiary of a nation that grave circumstances occur under which the provisions of the treaty may be likely to have a prejudicial effect upon the interests of that nation which were not known at the time to signature. Under such circumstances the sovereign power of a nation is by usage justified in declining to ratify the treaty. Thus, the King of the Netherlands refused in 1841 to ratify the treaty for the incorporation of Luxemburg into the Customs Union of the Germanic States on the ground of the injurious effects which it was likely to exercise upon the commercial interests of his subjects, which had been brought to his knowledge subsequently to the signature of the treaty. So the King of the French declined in 1841 to ratify the quadruple treaty for the suppression of the slave trade on account

of the objections raised against it in the French Chambers. So Great Britain declined in 1859 to ratify a treaty which her minister plenipotentiary had concluded with Nicaragua, and Nicaragua in the same year declined to ratify her convention with Great Britain for the settlement of the Greytown and Mosquito question. If, however, there should be an express provision that the preliminary engagements shall take effect immediately without waiting for the exchange of ratifications such a treaty will be an exception to the rule. (Twiss, T., the Law of Nations, sec. 233.)

## The Joint Resolution of Congress Dated May 21st Established Peace.

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### I.

1. The constitutional provision that the President, with the advice of two-thirds of the members of the Senate, can "make treaties" (Clause "Second," §2, Art. II), does not empower such special tribunal to make peace; nor was such grant intended to conflict with the full war powers of Congress—that is, power in the latter body to declare war and of necessity to declare it at an end—in other words to make peace.

2. The Congress itself by the usual majority vote has inherent primary power both to declare war and to make peace. Such power is inherent from the mere fact that Congress has been constituted and is the primary legislative medium for expression of the will of the people at large, the real sovereigns of the nation.

3. The express grant to Congress of a general power "to declare war" (clause "Tenth," §8, Art. I), is simply

an express confirmation of general war powers existent in such body. The grant to the President-Senate special and limited tribunal,—created for the one purpose of making "treaties,"—is only a grant generally to such tribunal to make compacts, i. e., contracts, between this and other nations in due and ordinary course of affairs; and such power or grant does not extend to or cover the abnormal and exceptional situation of a state of war—nor to any interference with the war powers of Congress.

4. Hence, the peace resolution declaring the war at an end, passed by Congress on May 21st last and repealing the two prior acts of 1917 declaring a state of war as existent between this country and the Central Powers, was a valid exercise of the war-and-peace powers of Congress, and such resolution is in full force and effect today.

5. The veto power of the President extends only to matters of "ordinary legislation" by Congress and not to acts or resolutions of that body upon fundamental matters affecting sovereignty itself, as for instance a declaration of war or a declaration of peace. And the attempted "veto" of said Act by the President was and is a mere nullity.

6. This principle has been sustained as applied to acts of Congress in submitting constitutional amendments for ratification by the states. (*Hollingsworth* v. *Virginia*, 3 Dall. (U. S.) 378; *Hawke* v. *Smith*, 40 Sup. Ct. Rep. 495 (498), July 1, 1920; and other citations cited *infra* in Argument.) The power to make war and peace—a power which involves the immediate defense of sovereignty against threatened extinction—is of a still higher—in fact the highest—plane of exigency and importance. And a fortiori such principle applies to it.

## Preliminary.

Throughout all the official discussions and all the agitations in the public prints over the issue of making peace with the German Republic and its allies, uttered and published since the armistice of November 11, 1918, it seems to have been generally and broadly assumed that there is but *one* legally valid way of consummating peace, namely, under the constitutional clause that "he" (the President) "shall have power by and with the advice and consent of the Senate, to *make treaties,* provided two-thirds of the senators present concur."

Apparently, the question never seems to have seriously entered any one's mind whether—assuming that such clause included the power to *make peace*—such power so granted was an *exclusive power,* to be exercised or not under *any and all* circumstances; or whether there must not *of necessity* exist *inherent power* either in *Congress or* in the people at large—*i. e.,* the electorate legally representing them—to make peace, *independently* of or in spite of such alleged grant of power to the President and Senate, and particularly in a case where the President and Senate shall have been unable to agree after having made one formal effort therefor, or after the expiration of a "reasonable time."

It would seem clear to any thoughtful and unprejudiced citizen of common sense, unhandicapped by exacting daily private or official duties, and having time to fully reflect on the subject, that if the clause quoted above were the *sole and only* method by which it is *legally possible* for our nation to consummate peace with an actual warring belligerent, *then* it would result that the President could actually exercise a physical power, *in and of himself alone, to continue the war.* He could do this by merely declining to submit *any* draft of treaty to the Senate; or,

having submitted one which it declined to conform, by refusing to submit *any other. Such a power so exercised would be almost as arbitrary as that ever exercised by any monarch in the world's history,* that is, a *power to continue a war* when perhaps practically the entire nation and all the people at large desired peace and were clamoring to have it declared upon the terms offered by the warring belligerent.

*What does it all mean?*

To test out the question, let us suppose that in 1914 the territory of Germany adjoined that of our own; that, acting upon the order of its Kaiser, it had declared war against us, or, dispensing with such a "scrap of paper" declaration, its army cohorts of millions had actually invaded and overrun a large, say the larger, portion of our country; and suppose, too, that, after a while, the Kaiser had been dethroned and the new German Republic established; and that shortly thereafter, while 10,000 human lives were going out each day in the struggle, such new public had offered satisfactory terms of peace, *i. e.,* satisfactory to a majority of Congress and generally to the people at large. Would the President of the United States—*one man*—have the physical power *to block indefinitely the making of peace and thus decree that the human slaughter and widespread distress and destruction of property, etc., should continue—until the German republic should offer and two-thirds of the Senate members should consent to certain specific terms drafted or approved by himself alone?*

Of course, such a thing could not be and hence *cannot* be. And to assume or claim that our President possesses such a power would be to condemn the institution of our Government as distintegratively weak to the "very marrow of its bones," and to effectually muzzle our mouths

when we attempted to say before the world at large: "*Our* Government is a *republic*. *Our* President has *no* arbitrary power. He is not an absolute monarch in *any* respect."

Of course, we repeat, such a thing could not be and *cannot* be; and no sane body *forming* a government in these days of humane regime and advanced civilization *would allow any man to assume* such a responsibility for it would *kill* any human *conscious* of possessing it and attempting to wield it—or drive him insane.

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And yet *nearly two years* have expired since the Armistice was declared, with no peace yet consummated! Technical war and a non-resumption of trade relationships, of immigration, etc., has continued with no effort on the part of anyone to prompt a testing out of the situation before the courts, or *to bring the ever urgent issue before the people at large*—if necessary so to do. Some more or less vague and informal suggestions have been made on the part of the President that he *would be willing* to submit the issue in some restricted form to the people at large and be guided by their sentimental vote on the subject! And the same sort of suggestions were made on the part not of the Senate, but of various Senators opposing the President's recommended draft of treaty that *they* would be *willing* to do the same thing! And the only tangible (?) thing on this subject now in prospect is the coming election of the next President of the United States and the informal publication of several party platforms, not even *involved* in such election, but merely incident to the *agitation* of such election, *i. e.*, of the *personal merits* of candidates *promiscuously and informally suggested* to the prospective electoral college! Such platforms are not, nor are any specific

"planks" embodied therein, to be formally *voted on* by the people.

All this simply assumes that *Congress* can not *provide for* nor can the *people at large demand* the making of peace when a war is actually raging; but that they are *powerless* to do otherwise than *allow* the President and Senate to make it, *i. e.*, to *allow* a deadlock between them to continue indefinitely, *i. e.*, to *allow* the slaughter, etc., to continue, *i. e.*, to *allow* the entire nation to be wiped out—its government, its constitution, its substance, its life and its property to be physically destroyed!

*Again we ask, what does it all mean?*

**Outline Arugment on Point I.**

1. Congress, as the primary legislative body of the people at large, has *inherent* legislative power to make war and to make peace. It has *full war powers*—which certainly means *at least* the power *to end war.*

The express grant in the Constitution to Congress of "power" "to declare war" is simply an *express confirmation of general war powers*—including power to make peace—which war powers exist without and independently of such grant. Such grant of power *"to declare war"* carries with it *of necessity* the power *to declare peace*—as naturally as does the privilege to start forest fires carry with it the privilege to put them out; or as naturally as does power to order the army forward carry with it the power to order it to halt or to retreat; or as naturally as one having power to give should have the power to quit giving.

2. The grant to the President and Senate of power "to make *treaties*" is simply a general grant—*i. e.*, a grant *generally*—to such tribunal to make *compacts* or

*contracts* between this and other nations in due and ordinary course of affairs; and it does not extend to or cover the *abnormal* and *exceptional situation of a state of war*—nor to an *actual interference* with the *war powers* of Congress.

(*a*) Because, in the first place, the term "*treaty*" and the term "*peace*" are *not identical.* A "treaty" is a mere compact or a contract between nations. 38 Cyc. 962. "A formal agreement or compact, duly concluded *and ratified,* between two or more nations," Standard Dictionary. Also "The act of *negotiating for* an agreement." *Idem.* This nation could be *at peace* with Somaliland and at the same time have no *treaty* with that people.

(*b*) Because the making of contracts applies to *ordinary* dealings and affairs between parties, and not to the *abnormal* or *exceptional.* A power of attorney given to my agent to make contracts or agreements on my behalf with my neighbor Smith does not carry with it power to order me to fight him or to order me to quit.

(*c*) Because all treaties, as well as all other existing contracts, made between this nation and another by the President-Senate agency are broken and nullified by the very *act* of Congress in declaring war. Congress thus has been granted a *greater* power than the one given to the special President-Senate agency or tribunal.

The function of the President-Senate tribunal has to any particular nation against which Congress has declared war is *suspended* during such war; and it is not restored until Congres has restored the normal relationship with that country—fully restored the *status quo*—by making peace and, of course, prescribing the conditions thereof.

3. Congress, it is true, could *allow,* and appropriately

allow, the President and Senate to negotiate a peace, and then bind itself by *adopting* their work or the resultant draft of their negotiations. So, too, there may come an occasion when the making of peace with a warring belligerent may involve or may be thought to involve the consideration of so many questions of permanent commercial intercourse or of some permanent plan of dealing with the adversary nation—or with *it* and *third party* nations—perhaps also with *neutral* nations, etc., etc., that Congress may properly and appropriately *choose* to await the exhaustion of the President-Senate efforts to agree upon the terms of peace before it exerts or exercises its *primary* and *reserve* power in respect to peace. It, however, remains free to exercise such primary or reserve power when such efforts have failed or at any time it may choose to ignore them or further dispense with them. (It happens that this program has been followed in the late negotiations—except probably that most of the congressmen were unconscious of the existence of such reserve power of Congress and particularly of its being capable of being exercised independently of the veto power of the President.)

However, the fact that Congress may have heretofore adopted and may hereafter adopt such a "waiting" course or policy *in particular instances* does not prove or involve the *surrender* of any of its primary and exclusive *powers* with respect to a state of war.

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4. The body granted power to *pass* an act creating a certain situation naturally has power to *repeal* it and to restore the *status quo*.

5. To grant to one body *exclusive power to declare war* and to grant to another body *exclusive power to*

*declare peace* would be about as uniquely anomalous, incongruous, contradictory and senseless a piece of constitutional legislation as could well be imagined. It would be like giving to one body the privilege to start forest fires and to another the privilege to put them out. It would be like giving to one officer the power to order the army forward and to another the power to order it to halt or to retreat.

It would be ridiculous enough if the bodies were upon the same plane of dignity; while here the one is a body of *general* legislative power and the other exists only for one special narrow semi-administrative function.

*Hence the strictest possible rule of construction should be adopted to avoid any such conflict or contradiction in grants.*

6. But no such conflicting legislation has been attempted here. Congress has been granted general and unrestricted power to create the abnormal condition of war and the clause "Power to declare war" must be read the same as if it read "To declare war and to declare peace." And if so read, it would not conflict with a power granted at the same time and by the same instrument to the President and Senate *generally* "To make treaties" or "To make contracts with other nations." For the making of contracts relates to the ordinary curriculum of international dealings, while, as said, war powers relate to an *abnormal* situation.

The same result would follow if the Constitution contained, as now, the President-Senate clause "to make treaties" and did not contain any grant of power to any one body in particular "to declare war."

For Congress would then possess inherent war *powers* by having been constituted, primarily, the body to act for the people at large—the body "whose statutes formed

the highest expression of popular will"; and also by virtue of the grant of power to carry out "all other powers vested by this constitution in the Government of the United States." (Clause 17, §8, Art. I.)

Therefore, since the general power "to make treaties" can be given a *natural effect* by *excepting* the power *to make peace in war time* and we can *thus avoid causing a square physical conflict with the operations of Congress* in respect thereto, why not so construe such grant, and as applying to the normal and *not* to the *abnormal*?

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7. The grant, so far as the President is concerned, is simply the grant of power to him *to negotiate* upon the usually complex subjects of commercial, tariff and other like treaties *and* to frame up a satisfactory instrument for submission to the Senate, and *then* to have the same made binding "by and with the *advice* and *consent*" of two-thirds of the members of that body.

Note the language: It is not that the "President *and* Senate shall have power *to make* treaties," but that "the President" is "*to make*," etc., and the Senate to *approve by vote*. This plan of having one person or official perform the work and the other approve it is *appropriate* to the making of *contracts generally* between nations, particularly on complex subjects.

8. If, therefore, the "*making of treaties*," generally speaking, is a different function from that of the "*making of peace*" (or from that of *merely repealing* an act declaring war), there is neither logic nor object in any attempt to make the two terms identical in meaning or scope.

9. But it *is*, however, thoroughly logical to leave untrammeled the *war powers* granted Congress—*i. e.*, power

"to declare war," and *of* necessity the power to declare peace—and hence to *prescribe the conditions* of peace; and *then* to grant *generally* power to the President and Senate "to make treaties"—that is, to cover the *general field* of international compacts.

10. Congress being the sole and supreme legislature for the people, and all war and peace decrees being the *extremest* act of a people, the grant to a special (and hence limited and unlegislative) tribunal, must be *strictly construed*, particularly as affecting a subject so vital as depriving Congress of any part of its own *natural* jurisdiction.

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11. It is now settled law that the function of Congress in submitting or proposing amendments to the Constitution does *not* require any action by the President, and no such proposal has to be submitted to him for his approval or veto; that such negative function of the President applies "only to *ordinary legislation*"; that such act of proposal is not one of ordinary legislation, but that the same *is an act affecting sovereignty itself and is thus independent of and above the Constitution.* (Citations *infra.*)

12. All the more true, then, is it that the act of *declaring war*—or peace—that is, an act expressive of the *war powers* of Congress, is *not* an act of ordinary legislation. Such an act is one of far graver moment and infinitely more exigent than one affecting any slow growing crisis or gradually maturing situation which ordinarily calls for amendment of the Constitution by the comparatively slow process of having the legislatures of three-fourths of the states consider and vote upon such change.

*Can anyone imagine a greater and more overwhelming issue than that of war?* To meet it under some circumstances may involve the "last call" of sovereignty itself.

*War*, involving as it does the very existence of the entire nation as such, involves the existence of the *entire constitution* of the nation. For the nation is *broader* than the constitution. And a state once formed and acting can exist without a constitution—"as a commonwealth at common law with a *sovereign legislature* whose statutes formed the highest expression of popular will." (Bryce, Am. Com., p. 464.)

Hence, if the President has nothing to do with a constitutional amendment proposal, *a fortiori* has he nothing to do with that *much graver* act—*an act* declaring war or peace.

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13. The President is *no part* of the *tribunal of Congress*. He belongs to another department of government. Congress exercises the power of legislation. The provision for the exercise of the President's veto power is a condition subsequent—a *contingent* condition that the power exercised by Congress in enacting a certain act may be rendered null upon the *happening of such veto contingency*.

14. There are acts of Congress as an independent and self-sufficient *body* with which the President has nothing to do—outside of the amendment proposal just referred to. Many "concurrent resolutions" of Congress need no presidential action whatever; as, for instance, a "concurrent resolution" to remove an official from office or to appoint committees of investigation of public affairs, or to compel the attendance of witnesses, etc.

In other words with the extremes of *action* by Congress as a body the President has nothing to do.

To test out this veto question thoroughly, let us imagine Congress as it is or would be had no veto power been granted the President.

Take out this constitutional veto grant and what have we left? We have a complete, independent, self-acting body, composed of two houses, which, by means of a majority of each, jointly legislate. Even this body is divided into two separate bodies, each of which can pass its own legislation affecting matters peculiar to its deliberations and to its action, such as appointing investigating committees, exercising the power to summon witnesses, expelling its own members, etc.

These two houses, then, acting jointly, cover three distinct areas or media of power:

*First.* *Formal* or *administrative* matters, such as the appointment of investigating committees, or the removal of officers from the public service, etc.

*Second.* The general field of *legislation*, all of which is *under* the Constitution and in subservience to it.

*Third.* The extreme and most vital functions, *affecting sovereignty itself*, which proceedings are *not* under but are *over* and *independent* of the Constitution. And the instances of such exercise on subjects of sovereignty are the calling of constitutional conventions to make changes in the Constitution, or directly submitting amendments to the Constitution, or exercising war and peace powers—an emergency which may imperil, and immediately imperil, *the existence* of the nation, including its Constitution and everything else.

Now, the grant of the veto power to the President applies to and covers only the second field or area above. And the practical result of the exercise of such power is to nullify the power of Congress in each instance to act *by the natural rule of the majority*, and *to force* it either to act by the far more stringent two-thirds rule—or not to act at all.

**The Attempted Veto of the Peace Resolution Was Inoperative and Void.**

The veto power of the executive applies only to *"ordinary legislation"* by Congress and *not* to its action upon *fundamental* issues, as for instance proposing amendments to the Constitution.

*Hollingsworth* v. *Virginia*, 3 Dallas (U. S.) 378.
*Hawke* v. *Smith*, 40 Sup. Ct. Rep. 495 (498), July 1, 1920.
Hoar Const. Conv. 82.
Jameson Const. Conv., 4th ed. 589.
12 C. J. 693, Sec. 28.
6 R. C. L. 29, Sec. 21.
4 Hind's Precedents House of Representatives, Secs. 3482-3483.
*Richardson* v. *Young* (Tenn.), 125 S. W. 664 (678).
*Haight* v. *Love*, 39 N. J. Law 14.
*State* v. *Sec'y State*, 43 La. Ann. 590 (633).
*People* v. *Ramer* (Colo.), 160 Pac. 1032.

The governor's veto of a resolution not legislative in character is inoperative and can be ignored.
(Last four cases.)

Such a proposal for amendment is a species of *"superior"*—not ordinary—"legislation."
Dodd, Rev. & Am. State Const., p. 232.

A joint resolution is described as a form of legislation which is in frequent use in this country *chiefly*—but not always—for administrative purposes of a local or temporary character.
Cushing's Law of Legislative Assemblies, Sec. 2403.

And a joint resolution not legislative in character, such as removing a state official from office, does not have to be approved by the governor.

*Gray* v. *McLendon* (Ga.), 67 S. E. 859 (868).

Hence, as said above, the field of Congressional action covered by the veto privilege extends neither to the gravest or most fundamental acts, on the one hand, nor, on the other, to the lightest or mose routine or "administrative" ones.

## II.

### In the Alternative.

**1. Even if the grant to Senate were worded so as to specifically cover the making of "treaties of peace," such grant would not be construed as exclusive.**

**2. For such a grant would conflict with the inherent and express war and peace powers of Congress.**

**3. The strictest construction known to the law would be warranted to avoid a conflict in grants upon such a vital subject.**

### Outline Argument on Point II.

*a.* But let us assume for the sake of argument only, that the grant to Senate was meant specifically to cover —was in fact worded so as to *specifically* cover—the making of "treaties of *peace;*" such grant in the very nature of things could not be *exclusive.*

*b.* For, on such assumption, such grant of power to the President and Senate—a special and limited as well as a non-legislative tribunal, created only for *one purpose,* viz., that of making peace—would have to be construed with the *utmost strictness* as respects the question whether or not such grant is *exclusive.*

A court would be warranted in going to any extremes in construction to save or avoid a physical *conflict* in grants and a deadlock upon a national fundamental issue involving the *very existence* of the nation at large.

*c.* So construing such supposed specific grant, the law would be: That such special power must be exercised within a *reasonable time;* and upon the failure of such special tribunal to consummate peace in such reasonable time, and particularly after one *full and fully formal effort* to do so had been made, Congress could *then* legally exercise its *primary and reserve power* to make peace, and this of course by a *majority vote.*

*d.* As respects the war with Germany, Congress has already exercised such reserve power by having passed said joint resolution (H. J. Res. 327), on May 21st last, after the President and Senate for a period of *over one year and a half* succeeding the armistice had *failed* to consummate peace. Such resolution repealed the act declaring war and "declared" the war *"at an end."* As to property seized during the war as "alien" property, it reserved the same for future adjustment by "treaty" to be made with Germany by the President and two-thirds of the Senate members, etc.

(It also reserved the right of this country to insist upon the indemnity shown by the Versailles treaty, etc.)

As respects the Austro-Hungarian people, the act contained no condition or reservation whatsoever.

*e.* The fact that such resolution was actually certified to the President for his approval and that the same drew forth his formal "veto" does not affect the action by Congress. The "veto" was a mere *idle ceremony,* from the standpoint of legal effect, and *such resolution of Congress is in full force and effect today.*

The Act being self-executing, no formal acceptance or acquiescence by the German Republic in the terms and import of such resolution was necessary *so far as the attitude of this nation* is concerned and the binding effect of the act upon all its officials and citizens.

In other words, even if the grant of the President and Senate were worded: "power to make treaties, *including treaties of peace,*" such latter clause would have to be read as meaning either:

(a) *a.* "In the absence of *prior action* by Congress"—similar to a privilege given the police force to put out a fire before the "fire laddies" should arrive;—or *b,* "in a *reasonable time* after hostilities shall have ceased"—which period in view of the overwhelmingly exigent situation would indeed be reasonably short; or *c,* "*subject to ratification by Congress*" (for a treaty is often used in the sense of "a compact subject to ratification." Standard Dic., *supra.*)

## III.

**A Specific Grant to Congress of an Exclusive Power to Declare War and a Specific Grant to the President-Senate Tribunal of an Exclusive Power to Declare Peace Would Be So Essentially Contradictory in Import and Effect as to Be Void.**

And the net result of such contradictory grants on such a subject would be to leave untrammeled the *inherent* war—and peace—powers of Congress.

### Outline Argument on Point III.

1. A grant to one body of exclusive power to *declare war* couched in the most explicit language, and a grant at the same time to another body of *exclusive* power to

*declare peace* given in just as specific language, would be so absolutely contradictory as that both grants would be void.

2. There are well-known instances of grants by legislatures of states where this principle has been upheld.

3. There is no reason, therefore, why such grants in a *constitution* would not be void, the grant to one body neutralizing the grant to the other. It would be the same as if *each* body were granted at the same time *exclusive* power *to declare war*. And hence, both could not be given exclusive power to *make peace, i. e.,* to end war.

4. This, therefore, would result in leaving the constitution intact in other respects and in leaving the power to declare war where it *naturally* inhered *independently* of such void and ineffectual grants, viz., in Congress.

5. For, to say that Congress would not have power to declare war and to declare peace except by an express grant would be to deny that there existed such a thing as *national sovereignty* by virtue of the various other grants of powers to Congress scheduled in the constitution; and that all of them taken together did not create a nation with the inherent right to *defend and protect* itself.

## IV.

### The Majority Rule as a Dominating Principle.

**Independently of and lying back of the three-barrier argument upon the merits above is another and independent principle, viz.:**

**1. That the rule of the majority dominates in the formal expression of the will of sovereignty in all crises and on all subjects which directly involve or threaten the existence of sovereignty itself.**

That is, there is a margin of jurisdiction—and it is a legal and clear, though perhaps a narrow, jurisdiction—lying between the Constitution on the one hand and anarchy and dissolution on the other in which the rule of the majority controls. The power to declare war or to make peace falls within such margin of jurisdiction.

2. Therefore, even though there were in our Federal Constitution the most clearly worded grant of exclusive power to the President-Senate agency to declare peace, the same would be void—because conflicting with such basal rule of the majority as applied to action by Congress. Congress in declaring war or making peace, acts as the direct representative of sovereignty itself.

3. And this same principle would apply had the President been granted in the most specific language the veto power over the war or peace resolutions of Congress; for the exercise of such power would violate such basal rule of the majority by requiring a two-thirds vote to offset or neutralize its effect. (A forty-nine-fiftieths rule would be no more offensive and void so far as the legal principle is concerned.)

4. The rule announced has been often sustained on precedent and authority as applied to the action of the electorate as the primal representative of the people at large of a state upon issues which are above and independent of their state constitution.

5. Hence, it is thoroughly applicable when Congress acts directly on behalf of national sovereignty and as its primal representative.

6. Therefore, the peace resolution of May 21 last, passed by a majority vote of each House of Congress, is valid since it was the direct action of the direct representative of sovereignty upon a subject which involves to its very marrow the existence of sovereignty and its defense against extinction.

**Outline Argument on Point IV.**

1. This principle announced in the heading applies to such subjects or issues as are *independent of and above* the constitution. The constitution does not "tally" with sovereignty in scope and dignity. The constitution is a *creature* of sovereignty.

And the making of war or the making of peace is *the most abnormal, the most exigent and exceptional, the most transcendantal of all* the powers of sovereignty, and most definitely demands above everything else the application of such rule.

For the state has a right to save itself and exhaust all its "body" strength to that end, just as the system of the patient exhausts its last atom of physical strength to save his life at the crisis of the fever.

2. The principle can be said now to be well settled by precedents when applied to the action of the electorate as the ultimate or primal representative of the people at large of a state. (Instances cited Point V. *infra.*)

In the case of the United States there is of course a national sovereignty, and there are subjects and issues which involve its existence and its preservation, the same as in the case of one independent state.

3. It may be answered, however, that while any action on such a subject by the *electorate* of the people at large might concededly be valid when exercised by a majority vote, it does not necessarily follow that the rule should obtain when applied to an action by *Congress* which *ordinarily* at least does not so directly represent the people at large as does the electorate; that Congress is in a manner a lesser body or inferior in grade of importance to the electorate, etc.

But the reply is: First, that Congress has been *speci-*

*fically* authorized to act *directly* for the people in case of war *without* submitting the issue to the electorate. Second, the electorate could not vote upon any issue, even though it be above or beyond the Constitution, without Congress having *first formally submitted* such issue to such body. Third, therefore, Congress must *initiate* such final action and hence of necessity it *shares* with the electorate in *responsibility* therefor; and hence, the rule of the majority of necessity must apply to the action of *each* body acting upon such fundamental issue and to each action or step *necessary* to any final action *at all.*

As said by the New York Court of Appeals, *infra*:

> "*Neither the* **calling** *of a convention* (*i. e.*, by the *legislature*) nor the convention itself is a proceeding *under* the constitution. It is *over and beyond* the constitution."

These vital considerations add another barrier to the three preceding, the entire four of which seem insurmountable and each of which seem to completely disrupt the concept of the grant of an *exclusive* power to the Senate-President tribunal to declare peace; while, *secondly*, two of such four propositions seem each to be sufficient to prove that any *attempt* to grant such an exclusive power would be *void.*

## V.

### The Precedents.

**We now submit the reasoning and the precedents supporting the majority rule as applied to action by the electorate, which support by analogy the claim of the validity of majority action by Congress on subjects directly affecting national sovereignty and its very existence.**

PRELIMINARY.

We here again say: That the idea that the sole peace-making power of our great republic, during a state of war validly declared by Congress, rests in the President and Senate and that thus it is within the power of *one man* to dictate the terms of peace in *any* case, no matter how imperiled the country might be in the contest nor how many thousands or tens of thousands of lives were being ground out each day by the gruesome mill, etc., is utterly fallacious. We say it is *more* than fallacious, it is *intolerable*—it is almost maddening. It is in a sense a libel upon our government as such—certainly upon its claims to being essentially and typically a *republic*.

And this being so, the question now pressing against the bosom of the republic is: Where does the power to make peace lie *primarily* and also *ultimately*?

We have attempted to show above that full power to declare war or peace lies in the Congress acting by a majority vote, untrammeled by any veto privilege of the President.

But in futherance of the object *to sound the entire subject to the bottom*, it is germane to show, as we do below, that the *ultimate* powers of sovereignty including war and peace powers, *rest in the people of the country at*

*large, to be exercised upon the formal invitation of the Congress, the body constitutionally formed as the primary medium of expression of the people's will and as the primary means of promulgation of their concentrated power and might; and, that upon the submission of any such issue by the Congress directly to the people at any specially called or specially designated general election, a majority vote of the electorate in such instance will be the legal expression of sovereignty itself upon such issue.*

This proposition is thoroughly supported in the completely analogous case of state constitutional conventions —called to meet some demand for a needed change in constitutional provisions—which have been treated as *legal*, though called in *direct defiance* of constitutional methods or provisions therefor.

The dominating principle is: that the sovereignty of the state rests in the people at large—they are the real sovereigns—as represented by their electorate, and that such action of the *majority* of the electorate is the *legal* action of sovereignty itself, which is above and independent of the constitution.

If, therefore, the principle applies to the case of a *convention, it applies with all the more directness and emphasis to the case of a submission of the one specific critical issue by the same legislative authority* (which issues the convention calls) and final action by the *same ultimate authority*—a majority of the electorate.

For it could not be contended that the cumbersome and roundabout method could be *valid* and at the same time the *more* direct method of obtaining the expression of the people's judgment on the *same* issue be *invalid*.

*And if, too, as we claim above, it applies to the action of the electorate when the latter* acts as the immediate voice of the people upon ultra-constitutional issues, it

must of necessity apply to action by Congress in cases when and where such body acts *directly* for the people instead of the electorate *upon such issues.*

If, then, Congress, the national legislature, shall formally submit to the people at a duly called election a draft of treaty, or alternative drafts thereof, or any other appropriate plan of making peace, *such procedure will be legal and action thereunder will be binding on the nation.*

Nor will any alleged doctrine of "States' Rights" stand in the way:

For, while our Constitution provides for amendments or revisions by either of two methods, viz.: (1), by ratification, by the legislatures of three-fourths of the states, of amendments proposed by Congress, or (2), by such measures as may be adopted by conventions held in three-fourths of the states, this does not and cannot *exclude* the method of submitting fundamental changes in the Constitution—or police measures which *pro tanto displace, or modify* or suspend the effect of a plank or two of the existing constitution—*to a majority vote of the individual electors of the entire nation* and without regard to states certainly *at least in a matter that affects the making of war upon the nation at large as a unit.*

Whatever, if anything, is left of the doctrine of "States' Rights" and a divided sovereignty,—pretty well shot to pieces in the Civil War—no one can deny that there is *enough existing national sovereignty* to declare war and defend the United States and this by the decree of its people *acting as a unit.* Hence the same is true as to declaring peace.

**Outline Argument on Point V.**

1. This power on the part of the people—while ever existent and never suspended—cannot be exercised or taken promiscuously. It can legally be taken, only in response to a formal or *official call* of its legally constituted acting body, viz.: its *legislature*.

2. A call issued by an informal or spontaneous body or assembly to the people to vote on such issue would not suffice. And in case the same had been issued and even if there had been an election held under it and an affirming vote of a majority, great or small, the courts on application would enjoin further proceedings under the call and hold such action void. *Luther* v. *Borden*, 7 How. 19.

3. Yet the whole question being *largely a political* question, it is nevertheless true that if the executive and legislative departments of the state had *acted* under a call of the kind for any substantial period of time, or if there had been a rather general yielding to the new order of things by the executive department, the courts would not interfere to restrain further action thereunder—on the ground of public acquiescence and public policy. *Miller* v. *Johnson*, 92 Ky. 589.

4. Analogies and supporting precedents to this asserted power of the people at large, etc.—are found in some four or five instances in the history of our country. In such cases there having been ineffectual attempts to get relief from a threatened evil by pursuing the prescribed methods, constitutional conventions were called in a manner *not warranted* by the existing constitution, and sometimes even *"in the very teeth"* of its very plainly worded technical requirements. And such conventions made the requisite changes or amendments and the latter were declared in force.

5. In such instances there happened to result no court

tests of the proceeding. For the *obvious necessity* of yielding to the new situation seemed to appeal to the common sense of the body politic, the people at large; and by a sort of common consent the new constitutions were generally recognized as in force, and thus they early became invulnerable from attack.

6. Two of such instances are the following:

The original Delaware constitution provided that there should be *no* change in vital provisions thereof, whether by amendment *or* convention revision, without a vote of at least five-sevenths of the members of the "Assembly" and seven-ninths of those of the "Council," which two houses constituted the legislature of the state.

The state needed a change in its Constitution in one or two respects and needed it very much. A number of efforts were made to get the requisite number of votes in the legislature for the proposed change, but they each failed.

Thereupon said body passed a resolution by a *majority vote*, reciting the failure of such efforts and the necessity for the change, etc., etc., and providing for the election of delegates to a state convention to be held for the purpose of revising the constitution, and making such changes.

Delegates were elected, the convention was called, it met and revised said instrument, making said vital changes referred to, and the new instrument was proclaimed and published and went into effect. Its validity was not *even questioned* and the people acted under it from the start. (See Jameson Const. Conv., 4th Ed., p. 596.)

A similar action was taken in 1850 in the State of Maryland.

The Constitution of 1776 of that state then in force,

Sec. 59, provided that neither the Form of Government nor the Bill of Rights nor any part thereof, should be altered, changed or abolished "unless a bill *so* to alter, change or abolish the same should pass the General Assembly and be published at least three months before a new election."

After violent contests between the friends and enemies of a proposed reform of the State Constitution, an act of the legislature—not to make the suggested changes but simply—*to call a convention* was finally passed in 1850. The result was the actual election of such a body and the adoption by it of the Constitution of 1851. (Jameson, p. 597.) The legislature never "*passed*" *any* of the measures so adopted.

The public evidently assumed that no provisions in the constitution could legally work to throw the state into anarchy and chaos, or rather that it had the right to save itself therefrom by adopting measures formally submitted to them—that is, to their electorate—by *their legally chosen legislature;* and the validity of the instrument was never questioned by any court proceedings.

7. The action of each of the States of Delaware and Maryland in these instances was the *legal expression* of the will of the *legal sovereigns* of such states.

And such legality is supported by and is based upon the following:

*a.* The state exists. With *no constitution whatever,* it would still exist.

Or, quoting from Mr. Bryce's work, "The American Commonwealth," (p. 464):

> "One could well imagine these several state governments working without fundamental instruments [constitutions] to control them. Each American state might now, if it so pleased, conduct its own

business and govern its citizens as a commonwealth at common law with a *sovereign* legislature whose statutes formed the highest expression of popular will."

*b.* In exigencies or crises which may directly involve the public health in general, or ultimately threaten the life of its people or the *very existence* of the state itself and preservation of its *government,* the rule that *"the majority controls," i. e.,* the majority of the electorate, is not only an *equitable* rule, but is a *legal* rule, *implied in the very existence of the state itself*—and this even though there be *express provisions* in the constitution of the state that a different rule, viz., a *two-thirds* or a *five-sixths* rule, for instance, should obtain when resort was to be had to legal action to meet the impending crisis. Hence,

*c.* All *extraordinary* or *unnatural* limitations in the constitution, which would *tend to give one generation the power to tie the hands of a succeeding one* or put limitation upon its *power* to change its fundamental law to meet any public crisis, should be construed *with the utmost strictness* and as *not applying* in full force to such overwhelming situation or exigencies *or* as *not exclusive.* And,

*The rule must obtain that one generation has not the power to decree that a certain method shall be the only one by which such change shall be made.*

*d.* The legislature is the natural, if not the only means through which the people speak or move to change their organization.

*e.* Such move must be made (or perhaps it should first be *attempted*) in the manner provided for by the constitution, and the legislature must [ordinarily should] keep within its limitations *unless* the health or peace and

tranquility of the state would be endangered by *delay, or by* [*further*] *attempts to follow* such method.

*f.* In such latter case the legislature *can* propose changes and this by a *majority vote.* If the *majority of vaters* (representing the *sovereign power*—the people themselves) vote affirmatively thereon, it will be *in fact the decree of sovereignty itself* and should be sustained by the courts, as warranted under the circumstances—as a measure *of necesity* adopted according to common law or universally accepted methods—as the only orderly and prompt way for *relief*—as essentially a *police measure* occasioned by a situation *unprovided for* [or rather *not met*] by the constitution—as a natural "last gasp." Such is not an act of "silent revolution" (as Jameson erroneously calls it, p. 597) but is rather the *orderly decree of a sane state organism,* that it will *not* throw itself into chaos and *be* "revolutionized."

In other words, *it is a legal principle.*

*g.* For the Assembly to refuse to speak in such a crisis, the courts to sustain, and the executive to execute, would be just about as logical and natural as for a man —though able to do so—to refuse to walk from the verge of a precipice, or as for one on the throes of death from suffocation to refuse to breathe pure air about him.

The heart of the state should be allowed free action to marshall and assert the last vestige of reserve power in a life and death struggle, as the heart of a man in the crisis of a fever which puts life in the balance.

*h. There is a law above the Constitution—the law of sovereignty itself*—as expressed by a *majority* of the electorate—the means of expression of the people at large.

Such action of sovereignty is essentially *legal* action, because *independent* of the Constitution and overruling

or amending—yes *displacing*—by its own force such portions, if any, of such instrument as might be in technical conflict with such action, and which would otherwise block emergency relief and bring disaster.

*i.* The law of the majority is a *just* rule, as is also the law of the scales. Occasionally a mere ounce might dominate the issue of tons in the balance. But the law of the scales is *just* in every case. On the other hand a foot-fall might start an avalanche—but no one has a right to take the step on the ground that it is only a step.

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8. In other words, the *state exists* independently of the constitution. The constitution exists *within* the state. Repeal the *entire* constitution and the state would still exist. (Bryce, "The American Commonwealth," *supra.*) And so existing, it could *act,* that is, by a *majority.* The ultimate theory is, *that one generation cannot tie the hands of another* and succeeding one, nor infringe upon the inalienable right of the people of *any* generation to change their fundamental government when it becomes necessary or *when a majority* of the people, *i. e.,* of the electorate, formally decide so to do. (Hoar, 13, 15.)

9. The rule of the *majority* is the rule of *ultimate* existence—**the life and death rule of a state.** Artificially created bodies—never act by two-thirds, three-fourths, four-fifths, or nine-tenths rule, unless under special acts—nor in any other proportions between that of *a majority* on the one hand and that of absolute *unanimity* on the other. (The latter is of course impossible.) There is no "God given ratio" or proportion that *inheres* as a *rule of action* in any numerous body, except the rule of the *majority.*

And the rule of the majority is the one rule which ob-

tains in a body without being stated. It is born with the body.

> "In every well regulated society, *the majority* has always claimed and exercised the right to govern the whole society, in the manner pointed out by the fundamental laws, and the minority are bound, whether they have assented or not, for the obvious reason that opposite wills cannot prevail at the same time, in the same society, on the same subject. 1 Tuck. Black. Com. Appx. 168; 9 Dane. Abr. 37; 1 Story. Const., §207." Bouvier Law Dic., "Majority Rule."

**Police Power.**

10. The doctrine of *police power* has been long established. In many instances statutes in apparent conflict with the letter of constitutions have been sustained under this doctrine, viz.: As being proper *police or defensive* measures under *extraordinary circumstances,* as measures of *necessity* for the public welfare.

11. And so it has often been said "a police law is *above* the constitution."

12. The *source* of this doctrine is *the power of sovereignty;* and, if constitutional provisions must yield to the action of sovereignty as expressed through *its creature,* the legislature, obviously those same provisions must yield to the *direct* action of *sovereignty itself.*

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FURTHER SUGGESTIONS.

As just said, the Delaware and Maryland cases and the main affirmative proposition here submitted come under the well known emergency principle of *police power, i. e.,* its highest expression—the power of *sovereignty itself.*

To these two instances, Mr. Hoar in his late work

(Const. Conv., 1917, pp. 51-2) adds four similar ones, which arose in the States of Indiana, Georgia, Pennsylvania and Florida.

In referring to such action of the States of Delaware and Maryland in the U. S. Senate, Senator Bayard, defended their action as *thoroughly legal,* and as based upon the following political axioms:

> "First, that all powers of government rest ultimately in the *people at large;* secondly, that a *majority* of those who choose to act may organize a government; and thirdly, that *the right to change* is included in the *right to organize,* and may in like manner be exercised at any time *by a majority.*" He further said that any restriction upon the power of the majority at any time *to change* their form of government "is inconsistent with their own authority *to form* a government and at war with the very axiom from which their own power to act is derived."

So Reverdy Johnson, the great Maryland lawyer, also said in the U. S. Senate in 1864:

> "No man denies that the American principle is well settled, that all governments originate with the people, and may by like authority be abolished or modified; and that it is *not within the power* of the people, *even for themselves, to surrender this right,* much less to surrender it for those who are to succeed them. A provision, therefore, in the Constitution of any one of the United States, limitating the right of the people to abolish or modify it, *would be simply void.* And it was upon this ground alone that our Constitution of '76 (Maryland) was superseded by that of '51. * * * The Constitution of 1851, therefore, rests on the *inherent and inalienable American principle,* that every people have a right to change their government."

Subsequently, referring to this principle, he also said:

> "In its *nature* it is revolutionary, but, notwithstanding that, *it is a legal principle.*" (See Jameson, Const. Conv. 4th Ed. 596-7.)

The proceedings taken in the States of Delaware and Maryland were *legal proceedings* and supported by a two-fold logic, viz:

First. It could not have been intended by the state organizers that it should be disrupted and broken up; and hence any provision framed by them would be construed *to except* a case which *threatened* such a crises or result.

Secondly. In bringing the child of state into life, such parental generation (forming the Constitution) *had no power to decree its death;* and to such extent any incumbering provisions in the instrument which would threaten such a contingency would be fundamentally *inconsistent* with the *very act* of state formation, and void.

Between such construction of the constitution and the technical rule of following *the letter* of the constitution *in all cases* lies all that lies between order and chaos, sanity and insanity, existence and death. And it should therefore not be hard to choose between them.

And a matter of affecting *peace* or *war* affects, of necessity, *national life* and *national extinction and is the highest expression of the police power.*

*There is a margin or area of jurisdiction and power lying between the constitution, on the one hand and anarchy and dissolution on the other—that of sovereignty itself.*

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Mr. Hoar says (p. 56):

> "The right of the people to change their government is not a right *under* the constitution, but it is rather a right *over* the constitution."

(*And if the people have a right to change their government they have a right to* SAVE *their government*).

"Or to quote from the Supreme Court of Virginia in an early decision:

'The convention of Virginia had not the shadow of a legal [this must mean *statutorily* legal] or *constitutional* form about it. It derived its existence and authority from a higher source; a power which *can supersed all law, and annul the constitution itself—namely, the people in their sovereign, unlimited, and unlimitable authority and capacity.*'"

"Or from the Supreme Court of New York:

'Neither the *calling of a convention*, nor the convention itself is a proceeding *under* the constitution. It is *over and beyond* the constitution.'"

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On page 13 Mr. Hoar quotes from various initial constitutions of the states, the well-known and basal formulas to the effect that "*all government of right originates in the people,*" etc. "When any government shall be found inadequate or contrary to these purposes, *a majority of the community hath an indubitable, inalienable and indefeasible right to reform and alter* or abolish it in such manner as shall be judged most conducive to the public weal."

P. 15: "The whole people in their sovereign capacity acting through the forms of law at *a regular election may do what they will* with their own frame of government, even though *that frame of government does not expressly permit such action,* and *even though the frame of government attempts to prohibit such action.*"

By the term "popular conventions" used throughout Chapter IV as well as in the two preceding chapters, Mr. Hoar defines and includes the action of the people at large speaking *at a regular election, either* in calling a convention *or* in taking some *direct action* on fundamental matters.

(See also pp. 26, 28, Hoar.)

> "It is *not necessary* that a given action be *either* authorized *or* prohibited by the constitution; *it may be permitted* by not being mentioned at all, or *it may be valid because outside the power* of the constitution."

Mr. Hoar concludes his Chapter IV thus:

> "Thus we may conclude that although *popular conventions* (that is, those called without *express* authority of the existing constitution as well as those called *in violation* of the express provisions of such constitution), *are not constitutional, it does not necessarily follow from this that they are void,* although the Rhode Island Supreme Court so contends. *They are really authorized by a power above the Constitution, to wit: the sovereignty of the people, and hence are supra-constitutional and perfectly valid.*" (P. 57.)

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*The above texts and reasons applying to constitutional conventions, of necessity, apply in all their cardinal principles to the simpler or more direct process of submitting constitutional amendments, and to still more extreme and vital acts of sovereignty above or beyond the constitution as for instance declaring war or peace.*

As a matter of fact the constitutional *convention* as an agency for constitutional *changes* has been habitually pushed beyond and far beyond its legitimate place in the development of American cinstitutional law. American states and publicists have acquired a sort of *convention habit.* The constitutional convention with wide open powers is *primarily* suited only to the *formation* of a state; and the natural process of development of an existing state is by *specific amendments* or *revisions* of its basal instrument.

As mere evidence that this thought is not given on

impulse and is the result of study and conviction, we beg to quote from a manual on the subject headed, "Chicago and the Constitution," prepared by the writer in connection with two other members of the Chicago bar, same 18 years ago (1902), a bound copy of which is in the Chicago Law Institute:

> "To say that after a republican state is formed and has existed a number of years, its organic system and fundamental law should be subject to be thrown aside for a new frame and declaration thereof, *or* that periodically conventions of the people should assemble to even *consider* such a step, is to condemn democracy itself and to assume that it is an experimental system of government.
>
> If there is much in the constitution which is illogical and cumbersome, it should be dropped or chopped off without bringing into the confusion and danger that which is vital. (P. 34.)"

• • • • •

Page 49:

> "No one who studies and reflects upon the question of constitutional conventions in America but will wonder why the people of so many states have resorted to them so frequently. These communities have acquired the *'convention habit.'* No better service could be done by a legal author than to show up to a 'going' state the unnaturalness of calling such conventions, and to help break this habit. But this must be the work of other hands than ours."

Hence, we say

1st. That the texts and principles supporting changes made through the indirect and burdensome and wasteful convention method, apply with all the greater force to the more *direct* and *specific* method of amendment.

2d. That submitting an immediate police power issue to the people must be equally valid, even though it displaces a contistutional clause and thereby or *pro tanto* amends such instrument.

**The Act under which this prosecution is brought is repealed or is suspended.**

**Repeal of Statute—Express of By Necessary Implication.**

The author (16 C. J. p. 69) says a penal law may, like any other statute be repealed by express or other necessary implication.

**Effect of Repeal.**

(C. J. 16, p. 70.)

The general rule is that if a penal statute is repealed without a saving clause, there can be no prosecution or punishment for a violation of it *before* the repeal. First U. S. Anonymous 1 Fed. Cas. 476; 1 Wash. C. C. 84; *Jordan* v. *S.*, 15 A. L. A. 746; *S.* v. *Mason*, 108th Ind. 48; *Keller* v. *S.*, 12 Md. 322; *C.* v. *McDonough*, 13 Allen 581; *C.* v. *M.*, 11 Pick. 350; *People* v. *Hiller*, 113th Mich. 109; *S.* v. *Long*, 78 N. C. 571; *S.* v. *Smith*, 56 Ore., 21; X. P. Maculean, 4th Porto Rico 119; *Greer* v. *S.*, 22 Tex. 588; *Halfin* v. *S.*, 5th Tex. Appeal 212; *Atto* v. *Commonwealth*, Second Ca. Cas. (4th Va.) 382; *State* v. *Campbell* 44 Wis. 529.

The author further says:

> "the repeal of an existing staute under which a proceeding is pending puts an end to the proceeding unless it is saved by a proper saving clause in the repealing statute and the penalty or punishment provided for under the repeal statute cannot thereafter be recovered or enforced *or the proceeding be further prosecuted. This is true even on a plea of guilty* and the fact that a defendant fails to accept at the trial, will not render a conviction valid." Citing authorities.)

*Even when a statute is repealed after the accused has been convicted,* judgment must be arrested and if an

appeal from a conviction is pending *when the statute* is repealed the judgment of conviction must be set aside and the indictment quashed even though argument has been heard, and the appeal dismissed.

*Hicks* v. *The U. S.*, 256 Federal page 707.

It appears from the evidence that Harry Hicks was convicted of operating a house of ill fame on the seventh day of December, 1918, in Louisville, Kentucky, within the district of a military cantonment designated by the Secretary of War in violation of an act of May 18, 1917. The Court in rendering an opinion said (page 710):

> "And so on November 11, 1918, Congress, knowing of his wishes, adopted the following joint resolution, viz:
>
> 'Resolved by the House of Representatives (the Senate concurring), that the two houses of Congress assemble in the hall of the House of Representatives on Monday, the 11th of November, 1918, at 1 o'clock in the afternoon, for the purpose of receiving such communication as the President of the United States shall be pleased to make to them.'"

Accordingly the two houses assembled in joint session in the hall of the House; the President appeared at the Speaker's seat, and gave to Congress information of the state of the Union in respect of the war it had declared on April 6, 1917. Having read to the Congress thus assembled the 34 terms stipulated in the armstice agreement entered into a few hours before and signed by the representatives of the German army, the President said:

> "The war thus comes to an end; for, having accepted these terms of armstice, it will be impossible for the German command to renew it.
>
> It is not now possible to assess the consequences of this great consummation. We know only that this tragical war, whose consuming flames swept from one nation to another until all the world was on fire, is at an end, and that it was the privilege of our own people to enter it at its most critical juncture in

such fashion and in such force as to contribute in a way of which we are all deeply proud to the great result. We know, too, that the object of the war is attained, the object upon which all free men had set their hearts, and attained with a sweeping completeness which even now we do not realize. Armed imperialism, such as the men conceived who were but yesterday the masters of Germany, is at an end, its illicit ambitions engulfed in black disaster." Congressional Record of November 11, 1918, and Official U. S. Bulletin, also of that date.

The question now to be decided is presented in this way: The acts charged in the indictment and claimed to constitute an offense against the United States were committed and done on December 7, 1918, at least 25 days after the President's communication to Congress had been officially and most conspicuously made declaring that the war "is at an end." Were the acts of the accused committed "during the present war" within the true meaning of that phrase as used in the section of the act upon which the government seeks to maintain the indictment and the conviction thereunder? Upon the proper answer to that question depends the authority of the court to inflict punishment upon him.

At the hearing it was urged on behalf of the United States that Congress alone can begin war, and consequently that Congress alone can terminate it. But that does not follow, for the Constitution, while in express terms giving Congress the sole power of declaring war, in no way so expressing itself as to give that body any authority itself to terminate it. And so in this instance, while Congress has not itself declared the war to be ended, in its presence the President—also the commander-in-chief of the army—did officially communicate to Congress the fact that it "is at end" upon the momentous occasion referred to and in the explicit terms we have given, and information of all the details of which

no doubt reached our entire population, including the person now under accusation, and all of whom might act upon the assumption that this official statement of the President was true.

The authoritative publications show that, while war is usually terminated by a treaty of peace, and that such treaty is the best evidence of such termination, history shows many instances in which wars were terminated without any treaty at all. Notably this must be so in domestic wars. So it is also where a complete conquest of the weaker nation leaves no one authorized to make a treaty. The public is oftentimes, perhaps generally, notified of treaties by official proclamation. But there is no prescribed form for such latter documents, and at last they are but official announcements of a state of fact. The President's official communication to Congress met all the conditions of an official proclamation, so far as such documents are designed for giving information. It was made on a notable occasion; it was made upon a theatre that attracted the attention of all the people of the United States, and indeed of the civilized world. The purpose of the President's oral message being to communicate information, it, if true, met the requirements of the question before us. Was that information accurate, or were the facts perverted? Does it now lie in the mouth of the government, in this persecution made made in its name, to insist that it was false, even if there is nothing like a technical estoppel?

Undoubtedly, if there be any doubt about it, a completely ratified treaty of peace is the best evidence of the termination of the war; but as we have said such a treaty is not essential to the actual ending of a war, as has many times been demonstrated. Indeed, there is no formal or ceremonious way agreed upon in international law or otherwise for ending a war. Circumstances gov-

ern such situations, and here as we have seen, they raise a most important, if not vital, question of fact, namely: Was the 7th day of December, 1918, "during the present war?"

For reasons more or less publicly known, no treaty of peace has yet been made; but it is claimed that actual war was nevertheless in fact ended last November, and the statement of the President, officially made and acclaimed on the 11th day of that month, and which met with quite universal acceptance by the people, is as effective in showing the fact of the actual termination of real war as would be the case with a treaty. In advance of a treaty, it is, of course, possible for the war to break out again; but, if it does not do so, then certainly it was in fact ended. If the announcement of the President was true and correct, then the 7th day of December, 1918, came after the war was at an end, and was not "during the present war," as that phrase is used in the statute under which this prosecution was begun. The accuracy of this proposition would seem to be obvious.

Again, the President's official statement was either true or it was mere rhetorical optimism. This court is by no means at liberty to yield to the latter alternative, for it is clearly of opinion, in view of current public history, that the President's statement was, in fact, correct when made, even if an agreed upon treaty of peace has been delayed in the making.

Every citizen of the United States, the defendant included, may well be presumed, first, to have been informed of the substance of the declaration made by the President, and, second, to have relied upon it as true. Probably all accepted it as correct, and rightfully acted upon it as being in fact true. Hostilities ceased, not a gun has since been fired, the demobilization of our troops is in active progress, and much acclaimed peace negotiations have

been under way. Under these circumstances every person in the country has the right to accept the President's official declaration as true, and to act upon it, and especially if it affected the question of whether certain acts were criminal or the reverse. Here most reprehensible conduct was made criminal only if committed "during the present war." When the war came to "an end," so did the thirteenth section of the Act of May 18, 1917, for, if the President's notable declaration was true and correct, the 7th of December, 1918, we repeat, was not "during the present war." That date, in those circumstances, was after that statute had ceased to be a law of the United States, in which case the acts alleged in the indictment could only be punished under the law of the state.

After it had declared war, Congress found it necessary to enact much war legislation, and provided in each act for a more or less extended period for the operation of its provisions, and doubtless undertook to make the length of that existence depend upon what it deemed the necessities of the subject-matter—the limitation fixed in the thirteenth section of the Act of May 18, 1917, presumably being based upon the Tenth Amendment of the Constitution. Possibly the most restricted continuance of such legislation was that fixed in the section involved in this case. A more detailed examination and search than is now deemed at all necessary might show in the so-called war legislation a great variety of phraseology used in fixing the circumstances and contingencies upon which its operation would come to an end; but all the while, and in respect to all such legislation, it must be presumed that Congress expressed itself exactly as it preferred in respect to each subject-matter. The extremes of this would probably be shown on the one hand in the phrase "during the present war," used in section 13 of the Act of May 18, 1917, and on the other in the quite intensive

phraseology of clause 4 of section 1 of the Act entitled "An Act to enable the Secretary of Agriculture to carry out during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the previous act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes" approved November 21, 1918 (40 Stats. 1046, c. 212).

To summarize: The Act of May 18, 1917, made criminal certain immoral conduct if committed "during the present war"—of course meaning the war with Germany, which a few weeks before, had been declared by Congress. The limitation distinctly specified by Congress for the continued operation of this criminal legislation was expressed in the words just stated. This limit thus fixed was not the making of any treaty of peace, nor its ratification, nor the mustering out of the troops making up our army. In fixing the time of continued operation of the act Congress used the words "during present war." This does not appear to be a case of technicalities, but for facts. If the war in fact had ended on November 11, 1918, it did not continue until the following December 7th. We know the war began on April 6, 1917. When did it end? On November 11th, as we have stated, the President communicated to Congress the express information that this "tragical war * * * thus at an end." This status, then ascertained and communicated to Congress by the chief of the executive and of the military service of the United States government, should, we think, be accepted as accurate and final by the court in this case.

In our view the statement by the President on November 11, 1918, must at the very least be received and treated as *prima facie* true in the present status of this case, though facts may possibly develop to show the contrary. In view of such possible developments of fact, we have

concluded it to be best to overrule the defendant's motion in arrest of judgment, but to sustain his motion for a new trial. If at the next term a new trial shall be had, an instructed verdict of not guilty can be asked, and the same might be given, if nothing then appeared to demonstrate the inaccuracy of the President's statement. This remark, however, should not be construed as reach any *ex post facto* legislation that may in the meantime be enacted.

Entries will be made accordingly.

**Federal Case No. 475 Anonymous.**

In this case the defendant was indicted charged with perjury before Commissioners of Bankrupts. The hearing was before Washington, Circuit Justice, and Peters, District Judge. Judge Washington delivering the opinion of the Court said:

> "The offense must not only come within the terms of such law, but the law itself must, at the time, be subsisting. It is a clear rule, that if a statute create an offense, and is then repealed, no prosecution can be instituted for any offense committed against the statute previous to its repeal. The end of punishment is not only to correct the offender, but to deter others from committing like offenses. But, if the Legislature has ceased to consider the act in the light of an offense those purposes are no longer to be answered, and punishment is then unnecessary."

The Court after reviewing the Repealing Act of December, 1803, directed the jury to find the defendant not guilty. The District Attorney in the above case contended that the Repealing Act did not apply for the reason that:

> "the doctrine applies only to cases of treason and felony." (Citing 2 Hawk (P. C.) 87; 1 Hawk (P. C.) 306; 1 Hale (P. C.) 291, 525; 2 Hale (P. C. 190.) With the limitation thus contended for the Court did not agree.

In *Keller* v. *The State,* 12th Md. 222, the defendant was indicted under an act to regulate the issuing of licenses to ordinary innkeepers and traders and was convicted, from which an appeal was taken and the Court said, pending appeal:

> "If the record is properly before us the motion must be granted. It is well settled, that a party cannot be convicted after the law under which he may be prosecuted has been repealed, although the offense may have been committed before the repeal." (Citing authorities.)
>
> "The same principle applies where the law is repealed or *expires pending an appeal or writ of error from the judgment of an inferior court.* It has frequently been recognized in admiralty cases where property was seized and condemned on the ground that the repeal of a law before the decision in the court above removed the penalty, and that the court in disposing of the appeal or writ of error, must decide according to existing laws at the time of the final judgment." (Citing authorities.)
>
> "Chief Justice Marshall states the doctrine generally, and not as applicable only to condemnations in admiralty. There seems to be no reason for saying that it shall not govern in other cases of penalty or fine when pending causes are not accepted in the repealing act and we may consider that the Court of Appeals so regarded this doctrine, for in the case of *State use of Washington County* v. *the Railroad Company,* 12th G. & J. 437, where the defendant claimed the benefit of an assembly releasing a penalty, the court relied upon what was said in 5 Cranch, 283, namely: 'The court is therefore of the opinion that the cause is to be considered as if no sentence had been pronounced and if no sentence had been pronounced, it has been long settled on general principles, that after the *expiration* or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.' The judgment in a criminal cause cannot be considered as final and conclusive to every intent, notwithstanding the removal of a record to a Superior Court. If this were so there

would be no use in making the appeal or suing out of a writ of error. To be sure it does not operate to stay the execution of the sentence, if the state chooses to proceed on the judgment; but, when deciding in favor of the accused, the reversal will operate so far as possible for his relief. If he be undergoing punishment according to the sentence pronounced, he will be discharged as in the cases of Black 2nd Md. Repts. 376; and Cochran, 6 Md. Repts. 400, and so if the law be repealed pending the appeal or writ of error the judgment will be reversed, because the decision must be in accordance with the law at the time of final judgment." Citing Chief Justice Marshall in 1 Cranch, 110, to the effect that, "if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." See also 3 Howard 534, where the Chief Justice said, that, "the repeal of a law imposing a penalty is of itself a remission of the penalty."

In *State* v. *Campbell,* 44 Wisconsin, p. 533-536:

"Chapter 340 contains no saving clause authorizing a prosecution under the old law for offenses already committed. There is therefore no law which will authorize or sustain a judgment on the verdict. It is true, by this construction all offenses committed by public officers under the revised statutes of 1858, which were not prosecuted to judgment prior to the new law taking effect, will go unpunished. *But this consequence must rest upon the legislature and not on the courts.* The legislature could easily have avoided such a result by enacting a proper saving clause in Chapter 340. As the law now stands we must hold that there is no statute under which the defendant can be punished. We may deplore this but it is beyond our power to help it without a violation of well settled principles of law."

In *Commonwealth* v. *McDonough,* 95 Mass., p. 581. A statute imposed for an offense a penalty of a fine and imprisonment. A subsequent statute was enacted which contained no saving clause as to offenses already com-

mitted, and imposed a different penalty for the same offense and the Court held that:

> "After the enactment of such subsequent statute, one who committed an offense before its enactment cannot be punished even by being sentenced to pay the minimum fine fixed thereby."

The Court said:

> "The penalty was repealed by the statute of 1866 without a saving clause and we must presume that the repeal was made by the legislature in view of the principles stated in *Commonwealth* v. *Marshall*, above cited, that if the law ceases to operate by its own limitation or by a repeal at any time before, no judgment can be given. We must also presume that the legislature had in view the principle of criminal law so important and so well established that penal statutes are to be construed strictly."

In *State* v. *Mason*, 108 Ind. 48, Mason, a County Treasurer, was indicted on the 20th of May, 1885, for embezzlement stating that his term of office was from 1778 to 1882. A demurrer to the indictment was sustained and an appeal prayed by the State. It was contended by the defendants that the act of 1881 repealed the act under which the defendant committed the offense complained of. The Court said, page 51:

> "While the law does not favor the repeal of statutes by implication, yet it is well settled that when a new statute covers the whole subject-matter of an older statute, and provides penalties for offenses enumerated in the older law, the former or older law is repealed by implication." (Citing authorities.)

In *Jordan* v. *State*, 15 Ala. 746, the defendant was indicted under an act of 1846 which provided that a slave merchant should procure a license from the County Clerk and pay $5.00 for each slave he offered for sale. The defendant upon the trial requested the Court to instruct the jury that this act was repealed by an act of 1848,

which was refused and the reviewing court held that as the Act of 1848 provided for a different penalty, that there was a plain repugnance that both acts could not stand together and the former by implication was repealed and said:

> "He has not violated the Act of 1848 and the Act of 1846 is no longer in existence nor is there and provision in 1848 to punish those who have offended against the Act of 1846. As the act under which the defendant was indicted was repealed before his trial, he could not be convicted. The Circuit Court erred in not giving the charge requested and the judgment must be reversed, and the cause remanded."

In *State* v. *Lang*, 78th N. C. 571, the defendant was indicted under a statute prohibiting a tenant from removing crops without the lessor's consent. It was contended that the Act of March 19, 1873, was repealed by that of March 12, 1877. The Court said:

> "It is well settled that the repeal of a statute *pending a prosecution* for an offense created under it, arrests the proceeding and withdraws *all authority to pronounce judgment even after conviction* and it is equally clear that no aid can be derived from the last enactment which is necessarily prospective only in its operation, and under the Constitution cannot apply to antecedent acts."

The motion in arrest of judgment was allowed.

In *Hiller* v. *The People*, 113 Mich. pp. 209-211, the statute provided a penalty for the willful neglect of an executor or administrator to deliver over to his successor property held in trust. This was amended increasing the time for compliance with the acts and increasing the maximum punishment. The Court held that this repealed the former act and said:

> "We understand the rule to be, in criminal cases, in the absence of a saving clause that where the penalty is altered in degree, but not in kind, by increasing the punishment which may be imposed, the ef-

fect of enacting the increased penalty is to repeal the earlier provision." (Citing authorities.) "The repeal or expiration of a statute imposing a penalty or forfeiture will prevent *any prosecution, trial or judgment for any offense committed against it while it was in force,* unless the contrary is provided in the same or some other existing statute." (Citing authorities.)

In *Commonwealth* v. *Marshall,* 28th Mass. 350-351, the defendants were charged with the commission of an offense by disinterring a dead body on *February* 20, 1831, in violation of the statute of March 2, 1815, which was repealed by a statute of *February* 28, 1831, without a saving clause. The Court said:

"It is clear that there can be no legal conviction for an offense, unless the act be contrary to law at the time it is committed; *nor can there be a judgment, unless the law is in force* at the time of the indictment *and judgment.* If the law ceases to operate by its own limitation, or by a repeal at any time before judgment, *no judgment can be given.* Hence, it is usual in every repealing law to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal, and continuing the repealed law in force, as all pending prosecutions, and often as to all violations of the existing law already committed."

In *State* v. *Smith,* 56 Ore. Rpts., p. 21. In this the Court said:

"We are therefore confronted with the anomalous situation of the accused having been tried and convicted of an offense committed while Section 1768 of the Code was in force, but which was, at the time of the trial and sentence, displaced by that part of the Act of 1909 above quoted. Yet the person convicted was not sentenced under the provisions of either act, but under the Act of 1905 (Section 1, p. 318, Gen. Laws 1905), which manifestly does not apply to crimes of this class; for the right to impose the sentence there provided is expressly limited to cases where the penalty may not exceed 20 years, while

the maximum penalty fixed by law for the offense of which defendant was convicted, in force when the sentence was imposed, was imprisonment for life. If common law offenses were recognized in this state, the legal difficulties presented would be easy of solution. For example: In Connecticut, in 1798, a case analogous to the one at bar was before the Appellate Court, in which the defendant was found guilty of burglary under an old statute, which at the time of his conviction and sentence had been repealed. A motion was made in arrest of judgment, but it was held that, as burglary was an offense at common law, a statute declaring the punishment was enforcible, notwithstanding the statute under which the crime was committed had been repealed."

In *Halfin* v. *State*, 5 Tex. Crim. Appls., the defendant was prosecuted by information, for violating an Act of 1866 prohibiting the sale or exchange of intoxicating liquor. It was insisted by the defendants that since the prosecution commenced, the county which had previously adopted the law prohibiting the sale of liquor, by election decided that the law should no longer be enforced and that the effect of this election was to relieve from prosecution and punishment those who had, prior thereto, been accused of violating its provisions. The Court said:

"The repeal of a penal law, when the repealing statute substitutes no other penalty, will be held to exempt from punishment all persons who have offended against the provisions of said repealed law, unless it be declared otherwise in the repealing statute." (Citing authorities.)

There is no general saving Act in the United States Statutes applying to the Law under consideration. The general saving Act in the Statutes of the United States (Revised Penal Code) applies only to the codified Penal Laws, which sections are as follows:

Section 342: The repeal of existing laws or modifications thereof embraced in this title shall not effect any

act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause prior to said repeal or modifications, but all liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made.

Section 343: All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, or changed, modified, or repealed by this title, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

The above sections of the Federal Statutes 1909.

They clearly apply *only* to acts enumerated in the Codified Laws.

Respectfully submitted,

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